A

KHAIRUDDIN HASSAN

v.

PP

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI AHMAD MAKINUDIN FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-91-2009 (M)]

C

1 JULY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 2660 grams cannabis - Appeal against conviction and sentence - Whether proper reliance placed on appellant's conduct in trying to flee from crime scene - Whether appellant in possession of drugs correctly concluded - Whether omission of comma in caution read to appellant and recorded rendered appellant's cautioned statement inadmissible - Whether High Court decision of PP v. Kamde Raspani good authority*

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This was the appellant's appeal against his conviction and sentence on a charge of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952. His appeal to the Court of Appeal was dismissed. The drugs concerned were 2660 grams of cannabis and were found in a bag on the floor mat of the front passenger seat of a car where the appellant was seated. The car was driven by one Yusmadi ('Yusmadi') who was jointly charged with the appellant in the trial court but later acquitted without his defence being called.

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The issues were: (1) whether the courts below placed too much reliance on the evidence of the appellant's conduct in trying to flee from the crime scene to establish his knowledge of the drugs; (2) whether proximity to the drugs and conduct in fleeing also applied to Yusmadi and as such it was wrong to conclude that the appellant was in possession of the drugs; and (3) whether the caution read to the appellant which did not have a comma after the word "tidak" – as per the following sentence, '... tetapi apa-apa jua yang kamu nyatakan, sama ada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan." – was ambiguous rendering the appellant's cautioned statement ('P38') inadmissible following the High Court decision of *PP v. Kamde Raspani*.

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Held (dismissing the appeal and affirming the conviction and sentence imposed by the trial court):
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) The conduct of one suspected of an offence was a relevant fact which might be considered and evaluated by the court in coming to a conclusion on whether the suspect perpetrated the offence. The act of running away from the scene of an offence was a relevant fact to be considered as per illus. (f) sub-section (2) of s. 8 of the Evidence Act 1950. Since the appellant's act of flight had a direct bearing on the offence he faced, he must satisfy the trial court why he reacted in that manner. The trial court, after seeing and hearing the appellant's explanation was the best forum for determining whether such an explanation was credible or believable. That explanation to rebut any inference detrimental to his defence became a relevant fact under s. 9 of the Evidence Act 1950, and a necessary factor for the trial court in its evaluation of the case in totality. (paras 7 & 8)

(2) The trial judge made a finding of fact that the appellant, and he alone, was in physical possession of the bag containing the drugs. The appellant's conduct of running away had a nexus to what was now a fact in issue, *viz*, that he was in physical possession of that bag. That in turn gave rise to an inference that he had knowledge of the drugs in the bag. It was thus up to the appellant himself to explain his conduct, and not for the court to offer or suggest one. (para 10)

(3) A trial judge with audio-visual advantage of the witnesses was entitled to accept one version and reject a contradictory version of any evidence adduced at the trial. The trial judge, in the present case, rejected the appellant's explanation given in defence that he never ran away. There was also no allegation during cross-examination of the prosecution witnesses that the police attempted to fix up the appellant, that they acted with malice against him or that they created a story about the appellant running away. (para 11)

(4) The proximity of the drugs to the appellant was a relevant fact to be taken into consideration (*PP v. Foo Jua Eng*; foll). As such, there was no fault with the trial judge's finding that, based on both the elements of the appellant's conduct and his proximity to the recovered drugs, coupled with his failure to

give any satisfactory explanation, that he had the *mens rea* possession of the drugs. That inference was made by the trial judge on sound factual findings and confirmed by the Court of Appeal. There was no justification to disturb those findings which were made by the trial judge even without considering the s. 27 information. (paras 12, 13 & 14)

(5) The trial judge accepted totally what was said in P38 including that part which exculpated Yusmadi fully from that offence for which both were charged. The relevant passage cited from the judgment of the trial judge clearly demolished the two elements of conduct and proximity against Yusmadi. (para 15)

(6) There was no ambiguity in the caution read to the appellant without the relevant comma. The appellant who was Malay was asked whether he understood the caution to which he said he did. The words in the caution were simple enough to be understood by a Malay speaking person. The High Court's decision in *PP v. Kamde Raspani* was not good authority to question the propriety of the caution merely because of the omission of a comma. Furthermore, a trial within a trial was held to determine the admissibility of P38. There was no challenge at that stage that the lack of comma made the caution read to the appellant ambiguous or misled the appellant in any way when he voluntarily gave his P38 statement. (para 16)

(7) The trial judge did not place the burden of proof on the admissibility of P38 on the appellant but that the appellant needed to adduce evidence of any elements of inducement, threat or promise to nullify the voluntary nature of P38. The trial judge rightfully held that the appellant had to raise only a reasonable doubt and that the prosecution had, after considering all evidence, proved beyond reasonable doubt that P38 was given voluntarily by the appellant. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap sabitan dan hukuman yang dijatuhkan ke atasnya atas satu pertuduhan mengedar di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Rayuan beliau ke Mahkamah Rayuan telah ditolak. Dadah yang terlibat adalah 2660 gram cannabis yang dijumpai dari dalam sebuah kereta, iaitu dari dalam sebuah beg yang terletak di atas alas kaki tempat duduk penumpang hadapan kereta yang diduduki perayu. Kereta dipandu

oleh seorang Yusmadi ('Yusmadi') yang dituduh bersama perayu di mahkamah bicara tetapi kemudian telah dibebas dan dilepaskan tanpa dipanggil untuk membela diri.

Isu-isunya adalah: (1) sama ada mahkamah-mahkamah di bawah bergantung secara yang keterlaluan kepada keterangan tingkahlaku perayu dalam melarikan diri dari tempat kejadian bagi membuktikan pengetahuannya mengenai dadah; (2) sama ada kedekatan kepada dadah dan tingkahlaku perayu melarikan diri juga terpakai kepada Yusmadi, dan kerana itu adalah salah untuk merumuskan bahawa perayu mempunyai milikan dadah; dan (3) sama ada amaran yang dibacakan kepada perayu, yang tidak mempunyai tanda koma selepas perkataan "tidak" – sepertimana ayat '... tetapi apa-apa jua yang kamu nyatakan, sama ada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan" – kabur, sekaligus menyebabkan kenyataan beramaran perayu ('P38') tidak boleh diterima-masuk berasaskan keputusan Mahkamah Tinggi di dalam *PP v. Kamde Raspani*.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman yang dijatuhkan oleh mahkamah bicara)
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Tingkahlaku seseorang yang disyakki melakukan suatu kesalahan adalah satu fakta yang relevan dan boleh dipertimbang dan dinilai oleh mahkamah dalam mencapai rumusan sama ada suspek tersebut telah melakukan kesalahan. Perbuatan melarikan diri dari tempat kejadian adalah satu fakta relevan dan boleh diambilkira seperti yang dihuraikan di dalam huraian (f), seksyen kecil (2) s. 8 Akta Keterangan 1950. Oleh kerana perbuatan melarikan diri oleh perayu berkaitan secara terus dengan kesalahan yang dihadapinya, maka beliau perlu memuaskan mahkamah bicara kenapa beliau bertindak sedemikian rupa. Mahkamah bicara, setelah melihat dan mendengar penjelasan perayu adalah forum terbaik bagi memutuskan sama ada penjelasan tersebut berkredibel atau boleh dipercayai. Penjelasan bagi menyangkal inferens yang boleh memudaratkan pembelaannya tersebut adalah relevan di bawah s. 9 Akta Keterangan 1950, dan adalah juga satu faktor penting bagi mahkamah bicara apabila menilai keseluruhan kes.

A **(2)** Hakim bicara telah membuat dapatan fakta bahawa perayu, dan hanya beliau sahaja, yang mempunyai milikan fizikal beg yang mengandungi dadah. Tingkahlaku perayu dalam melarikan diri mempunyai kaitan dengan perkara yang kini menjadi fakta di dalam isu, iaitu bahawa beliau mempunyai milikan fizikal beg
B tersebut. Itu sebaliknya membangkitkan inferens bahawa beliau mempunyai pengetahuan tentang dadah di dalam beg. Oleh itu, terpulanglah kepada perayu untuk menjelaskan tingkahlakunya, dan bukan tugas mahkamah untuk memberikan atau mencadangkan penjelasan sedemikian.

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(3) Seorang hakim bicara yang mempunyai kelebihan audio-visual terhadap saksi-saksi berhak untuk menerima suatu versi keterangan dan menolak versi keterangan bercanggah lain yang diberikan di mahkamah. Hakim bicara di dalam kes semasa
D telah menolak penjelasan perayu yang diberikan semasa pembelaan bahawa beliau tidak pernah melarikan diri. Selain itu, tidak terdapat alegasi semasa pemeriksaan balas saksi-saksi pendakwaan bahawa pihak polis telah cuba untuk menganiayai perayu, atau bertindak dengan niat jahat terhadap perayu
E ataupun hanya mereka-reka cerita mengenai perayu cuba melarikan diri.

(4) Kedekatan dadah kepada perayu adalah satu fakta relevan yang harus diberikan pertimbangan (*PP v. Foo Jua Eng*; diikuti). Oleh
F itu, tiada cacat celanya dengan dapatan hakim bicara bahawa, berdasarkan kepada elemen-elemen tingkahlaku perayu dan kedekatannya dengan dadah yang ditemui, ditambah dengan kegagalannya memberikan penjelasan yang memuaskan, beliau sememangnya mempunyai milikan *mens rea* dadah. Inferens
G tersebut dibuat oleh hakim bicara berdasarkan dapatan-dapatan fakta yang kukuh dan disahkan oleh Mahkamah Rayuan. Maka tiada justifikasi untuk mengganggui dapatan-dapatan yang dibuat oleh hakim bicara tersebut walau tanpa mengambilkira maklumat s. 27 sekalipun.

H **(5)** Hakim bicara menerima sepenuhnya apa yang dikatakan di dalam P38 termasuk bahagian di situ yang menyahsalah Yusmadi sepenuhnya dengan kesalahan di mana kedua-dua mereka dipertuduhkan. Ungkapan-ungkapan relevan yang dipetik dari penghakiman hakim bicara jelas telah melenyapkan kedua-
I dua elemen tingkahlaku dan kedekatan terhadap Yusmadi.

(6) Tidak terdapat kekaburan pada amaran yang dibacakan kepada perayu walaupun tanpa koma yang dikatakan. Perayu yang berbangsa Melayu telah ditanya sama ada beliau memahami amaran dan beliau mengatakan memahaminya. Perkataan-perkataan di dalam amaran adalah perkataan-perkataan yang mudah difahami oleh seorang yang bertutur Bahasa Melayu. Keputusan Mahkamah Tinggi di dalam *PP v. Kamde Raspani* bukan merupakan autoriti kukuh untuk mempersoalkan keteraturan amaran cuma atas alasan koma. Lagipun, suatu perbicaraan dalam perbicaraan telah diadakan bagi memutuskan kebolehterimaan P38. Tiada apa-apa cabaran dibangkitkan di peringkat itu bahawa ketiadaan koma telah menyebabkan amaran yang dibaca kepada perayu kabur atau telah dengan apa cara sekalipun mengelirukan perayu bilamana beliau secara sukarela memberikan kenyataan P38nya.

(7) Hakim bicara tidak meletakkan beban membuktikan keboleh terimaan P38 ke atas perayu, namun perayu mestilah mengemukakan keterangan mengenai elemen-elemen dorongan, ugutan atau janji bagi membatalkan sifat kesukarelaan P38. Hakim bicara telah memutuskan dengan betulnya bahawa perayu hanya perlu membangkitkan keraguan munasabah, dan bahawa, mengambilkira keseluruhan keterangan, pendakwaan telah berjaya membuktikan di luar keraguan munasabah bahawa P38 adalah diberi dengan secara sukarela oleh perayu.

Case(s) referred to:

Chan Kwok Keung & Anor v. The Queen [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386 CA ***(refd)***

Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***

PP v. Foo Jua Eng [1965] 1 LNS 137 HC ***(foll)***

PP v. Kamde Raspani [1988] 2 CLJ 644; [1988] 2 CLJ (Rep) 251 HC ***(not foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a)

Evidence Act 1950, ss. 8(2), 9, 27

For the appellant - Hisyam Abdullah; M/s Teh Poh Teik

For the respondent - Saiful Edris Zainuddin DPP

Reported by Usha Thiagarajah

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JUDGMENT

Abdull Hamid Embong FCJ:

[1] The appellant was convicted by the High Court on a drugs trafficking charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). His appeal to the Court of Appeal was dismissed on 29 April 2009.

[2] The drugs concerned in this case was 2660 grams of cannabis, packed in three transparent plastic bags kept inside a bag, which was found on the floor mat of the front passenger seat in the car where the appellant was seated. The car was driven by one Yusmadi, who was jointly charged with the appellant but acquitted without his defence called.

[3] A cautioned statement (P38) recorded from the appellant was admitted as evidence by the trial judge after conducting a *voir dire* to determine its voluntariness. A piece of information given by the appellant to the police during an interrogation session immediately after the appellant's arrest was also admitted as evidence pursuant to s. 27 of the Evidence Act 1950. In that information (exh. P21A) the appellant told the police that he had kept three kilograms of ganja near his feet under the seat next to the driver. At the trial the appellant claimed that he had given that information as a result of being roughed up by the police, that he was kicked and punched by them during the interrogation. The learned trial judge found from the evidence that there was no use of force by the police and admitted that s. 27 information. The Court of Appeal in reviewing that part of the evidence found no error on the part of the learned trial judge, in accepting the version of the prosecution and rejecting the appellant's version. We agree with both findings.

[4] When the car carrying the drugs was accosted by the police at 11pm on the night of 7 August 2001, both the driver (Yusmadi) and the appellant attempted to escape. They were however immediately apprehended after a short chase and scuffle. The learned trial judge relied *inter alia* on this conduct of the appellant trying to escape in coming to the conclusion that the appellant had actual possession of the drugs and thereby concluding that a *prima facie* case against him had been proven.

[5] The Court of Appeal affirmed the finding that the appellant had *mens rea* possession of the drugs and concluded that the prosecution had established the element of actual possession without the aid of the presumption under s. 37(d) of the Act, and thus, invoked the presumption of trafficking under s. 37(da)(vi) of the Act against the appellant.

[6] Before us it was submitted by appellant's counsel that both the High Court and the Court of Appeal had misdirected themselves as to the conduct of the appellant in fleeing the scene by placing too much dependence on that evidence as a telling factor in respect of the knowledge of the appellant of the drugs at his feet. It was argued that the learned trial judge had failed to put that evidence to the maximum evaluation test in coming to that conclusion. It was contended that since the appellant was not the sole occupant of the car and that Yusmadi was in custody and control of the car it may be inferred that he, Yusmadi, was also in custody of all items in that car. Learned counsel cited the case of *Gooi Loo Seng v. PP* [1993] 3 CLJ 1, in submitting that a miscarriage of justice had occurred when the trial judge failed to view all the evidence objectively. Learned counsel also argued that the elements of proximity to the drugs and conduct of flight can also be resolved against Yusmadi. Thus it was wrong for the learned trial judge to have concluded, based on these same two elements, that it was the appellant who was in possession of the drugs.

[7] The conduct of one suspected of an offence is a relevant fact which may be considered and evaluated by the court in coming to a conclusion on whether the suspect perpetrated the offence. Section 8(2) of the Evidence Act 1950 states that:

> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

The act of running away from the scene of an offence is certainly a relevant fact as can be seen from this illustration under that sub-section:

A (f) The question is whether A robbed B.

The facts that after B was robbed, C said in A's presence: "The police are coming to look for the man who robbed B" and that immediately afterwards A ran away are relevant.

B **[8]** Since the appellant's act of flight had a direct bearing on the offence he faced, he must satisfy the trial court why he reacted in that manner. The trial court, having had the advantage of seeing and hearing the appellant's explanation is the best forum for determining whether such an explanation is credible or believable. C This explanation to rebut any inference detrimental to his defence becomes a relevant fact under s. 9 of the Evidence Act, and necessary for the trial court in its evaluation of the case in totality. Section 9 of the Evidence Act states that:

D **Facts necessary to explain** or introduce a fact in issue or relevant fact, **or which support or rebut an inference suggested by a fact in issue or relevant fact,** or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, E **are relevant so far as they are necessary for that purpose.** (emphasis added)

[9] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717, the Federal Court explains the need for this explanation of an accused person's F conduct in this manner:

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by G him. *The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction* … (emphasis added)

[10] In this case, the learned trial judge had made a finding of fact that the appellant, and he alone, was in physical possession of the H bag containing the drugs. The appellant's conduct of running away has a nexus to what is now a fact in issue, *viz* that he was in physical possession of that bag. This in turn gives rise to an inference that he had knowledge of the drugs in the bag. It is thus up to the appellant himself to explain his conduct, and not for the I court to offer or suggest one. *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386 is authority for

the proposition that an act of running away may be viewed as an admission of guilt. The learned trial judge was therefore not wrong in making that inference in the circumstances of this case, where the drugs were found to be in the appellant's physical possession.

[11] In his defence, read from a statement from the dock, the appellant said that he never ran away and this explanation was rejected by the judge. It is trite that, a trial judge, with audio-visual advantage of the witnesses, is entitled to accept one version and reject a contradictory version of any evidence adduced at the trial. There was no allegation during cross-examination of the prosecution witnesses that the police had attempted to fix up the appellant, or that they had acted with malice against him or even that they had cooked up a story about the appellant running away.

[12] As regards the proximity of the drugs to the appellant, this too is a relevant fact. This principle is derived from this passage in *PP v. Foo Fua Eng* [1965] 1 LNS 137, where HRH Raja Azlan Shah stated:

> With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

[13] As such we cannot find fault with the finding of the learned trial judge that, based on both the elements of the conduct of the appellant and his proximity to the recovered drugs, coupled with his failure to give any satisfactory explanation, he was in *mens rea* possession of the drugs. This was an inference made by the learned trial judge based on sound factual findings which is now confirmed by the Court of Appeal. We find no justification in disturbing those findings.

[14] It is convenient at this point to mention that this finding was made by the learned trial judge even without considering the s. 27 information. In his judgment, the learned trial judge said this:

A Oleh itu saya memutuskan bahawa tanpa mengambil kira pernyataan OKT2 di bawah seksyen 27 Akta Keterangan 1950 pun, terdapat keterangan yang mencukupi untuk membuktikan secara factual bahawa OKT2 mempunyai possession dadah berbahaya yang terkandung dalam bungkusan plastic hitam (P8).

B **[15]** As regards the role of Yusmadi, the learned trial judge after considering the two elements of conduct and proximity mentioned earlier also took into consideration P38, the cautioned statement of the appellant. And the learned judge accepted totally what was said in P38 including that part which exculpates Yusmadi fully from the C offence for which both are charged. We reproduce below this passage from the judgment of the learned trial judge, which clearly demolishes the submission that these two elements of conduct and proximity can be resolved against Yusmadi.

D Jika keterangan-keterangan yang telah disebutkan itu ditimbang secara keseluruhannya, ia boleh membawa kepada inferensi bahawa pada masa yang material OKT1 (Yusmadi) sedang mengangkut (transporting) dadah berbahaya yang ada dalam kereta tersebut. Tetapi untuk membolehkan kesimpulan tersebut dibuat, mestilah terdapat keterangan yang mencukupi untuk membuktikan bahawa E OKT1 sedar atau mempunyai pengetahuan tentang dadah berbahaya dalam kereta yang dipandunya itu. Sehubungan ini, keterangan bahawa dia telah melarikan diri dari kereta tersebut boleh membawa kepada kesimpulan bahawa OKT1 tahu bahawa dalam kereta itu ada dadah berbahaya. Tetapi untuk membuktikan F *prima facie* kes terhadap OKT1, kesimpulan itu hendaklah merupakan kesimpulan yang mesti dibuat dari keseluruhan keterangan yang ada di hadapan Mahkamah. Di sinilah P38 menjadi relevan. Di bahagian akhir dalam P38, OKT1 menyatakan, "cuma saya nak bagi tahu yang kawan saya Ismadi (ie, Yusmadi) tidak tahu ada dadah dalam kereta, kerana saya cuma minta dia bawa G saya ke Melaka. Kereta itu dia yang punya. Itu saya nak tambah, lain tidak ada.

[16] The next issue argued was in respect of the correctness of the admission of P38, the cautioned statement. The attack on the H correctness for its admission was two-pronged. Firstly, learned counsel submitted that the caution read to the appellant is ambiguous in that a comma is missing after the word "tidak" in the caution which reads:

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> Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu, bahawa kamu tidaklah diwajibkan berkata sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, sama ada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan.

It was submitted that without the comma, the caution could mean that what the appellant said could be used in evidence or that it could not be used in evidence against him. Reference was made to the High Court decision of *Public Prosecutor v. Kamde bin Raspani* [1988] 2 CLJ 644; [1988] 2 CLJ (Rep) 251, where the same issue arose and that this flaw in the caution was found to be fatal, and as such, the caution statement inadmissible.

We have read and re-read the words of the caution in P38 and found that, even without the comma, there is no ambiguity in the caution. We notice that immediately after the caution was read and explained to the appellant (who is a Malay), he was asked whether he understood the caution to which he said he did. We find the words in the caution simple enough that, even without any translation, would be easily understood by any Malay-speaking person. We say that the interpretation given by the High Court in Kamde is overstretching the significance for the need of a comma after the word "tidak" and should not be taken as good authority to question the propriety of the caution merely because of the omission of a comma. The caution is after all a record in writing of what was said to the appellant. The phrase "samada menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan" cannot be said even without pausing after the word "tidak", that the caution will not make sense, or that its meaning is ambiguous. To us this is a non-issue. Furthermore, a full trial within a trial was held to determine the admissibility of the cautioned statement. And we find no challenge at that stage that the need for a comma had made the caution ambiguous or had misled the appellant in any way, when he voluntarily gave his statement in P38.

[17] The second line of attack for admitting P38 as evidence is focused on the misdirection of the learned trial judge who, it was submitted, wrongly placed the burden of proof of voluntariness on the appellant. Learned counsel cited this line from the judgment to support his submission:

> Ertinya, OKT2 perlu menunjukkan bahawa dorongan, ugutan atau janji yang didakwa itu telah mempengaruhi fikirannya untuk memberikan percakapan itu.

A We do not agree that what the learned trial judge said in the passage quoted above means that he had placed the burden of proof on the admissibility of P38 on the appellant. What that passage merely means is that the appellant needs to adduce evidence of any element of inducement, threat or promise to nullify the voluntary B nature of his cautioned statement. We have scrutinised that part of the judgment on the conduct of the trial within a trial which runs into 31 pages and find no flaw in the decision of the trial judge to admit P38. As regards the burden, we are satisfied that the learned trial judge had not misdirected himself. His Lordship was in fact on C the right track when he made his conclusion on the burden placed on the prosecution in this trial within a trial, by saying:

> Saya akur bahawa OKT 2 hanya perlu menimbulkan keraguan yang munasabah bahawa ID38 telah tidak diberi secara sukarela. Setelah menimbangkan keseluruhan keterangan dalam perbicaraan, saya D memutuskan bahawa pihak pendakwa telah membuktikan melampaui keraguan yang munasabah bahawa percakapan dalam ID38 telah diberi oleh OKT 2 secara sukarela. Saya telah menerima ID38 itu masuk dalam keterangan dan dikemukakan sebagai P38.

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[18] For these reasons, this appeal is dismissed and the conviction and sentence imposed by the High Court are affirmed.

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